Supreme Court, U.S.
FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Docket No. 80-160

JOHN A. RUSECKAS, Petitioner,

vs.

HOWARD B. GUNSTEN, t/a THE GUNSTEN AGENCY;
JOHN HANCOCK MUTUAL LIFE LNSURANCE COMPANY, Respondents.

MOTION FOR LEAVE TO PROCEED AS A VETERAN

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

JOHN A. RUSECKAS, by the undersigned attorney, hereby moves, pursuant to Supreme Court Rule 47.1, for leave to proceed as a veteran suing to establish rights under 38 U.S.C. § 2022, and to file the annexed Petition for Certiorari upon typewritten papers and without payment of fees. Petitioner's affidavit setting forth his status as a veteran is annexed hereto.

WHEREFORE, petitioner respectfully prays that he be permitted to proceed as a veteran within the meaning of Supreme Court Rule 47.1.

Respectfully submitted,

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Attorney for John A. Ruseckas

IN THE SUPREME COURT OF THE UNITED STATES

Docket No. _____

JOHN A. RUSECKAS, Petitioner,

vs.

HOWARD B. GUNSTEN, t/a THE GUNSTEN AGENCY;
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, Respondents.

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION
FOR LEAVE TO PROCEED AS A VETERAN

JOHN A. RUSECKAS, first being duly sworn, deposes and says that he is the Petitioner in the above-styled action, that at all times pertinent he was and continues to be a member of the United States Air Force Reserve, that he brings the attached Petition in order to secure employment rights which he believes to be protected under the Veterans' Reemployment Rights Act, 38 U.S.C. § 2021 et seq., and that he therefore requests that he be granted leave, pursuant to Supreme Court Rule 47.1, to proceed as a veteran.

JOHN A. RUSECKAS

Sworn to and subscribed before me
at Haddonfield, New Jersey,
this 29th day of July, 1980.

MARIETTE GAMM
NOTARY PUBLIC OF NEW JERSEY
MY COMM. EXP. APR. 20, 1983

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JOHN A. RUSECKAS, Petitioner,

vs.

HOWARD B. GUNSTEN, t/a THE GUNSTEN AGENCY;
JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

JOHN A. RUSECKAS, by the undersigned attorney, hereby petitions that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review its judgment in No. 79-1477, insofar as it affirmed a judgment and order of the United States District Court for the Eastern District of Virginia which dismissed petitioner's Veterans' Reemployment Rights Act complaint against the respondents herein.

QUESTION PRESENTED

Did the deadline within which petitioner, a sales trainee, would have to meet his quarterly sales quota constitute a protected "incident or advantage of employment" under the Veterans' Reemployment Rights Act, so that where (1) petitioner had earlier resigned in response to an ultimatum to quit his Air Force Reserve unit or quit his employment, (2) petitioner's unconditional reinstatement had then been negotiated by the Department of Labor, but (3) respondents thereafter refused to set the quota deadline so long as the Department of Labor monitored the situation, the uncertain condition respondents thereby imposed upon petitioner's reinstatement perpetuated his prior constructive discharge in violation of the Act?

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OPINIONS BELOW

The per curiam opinion of the court of appeals is unpublished. The opinion of the district court, per Hon. John A. MacKenzie, Chief Judge, is unpublished. A copy of each opinion is reproduced in the Appendix, infra.

JURISDICTION

The decision of the court of appeals was announced on May 1, 1980. No application for rehearing or for extension of the time within which to file this Petition was made.

Petitioner invokes this Court's certiorari jurisdiction as established by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 38, United States Code, Section 2021(b)(3), provides, in pertinent part:

> Any person who holds a position . . . [in the employ of a private employer] shall not be denied rentention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Services.

STATEMENT OF THE CASE

In late March, 1977, John A. Ruseckas, then a Captain (and now a Major) in the United States Air Force Reserve, accepted employment as a life insurance sales trainee with Howard B. Gunsten, a general agent of the John Hancock Mutual Life Insurance Company (hereinafter, "Hancock"). The terms of his employment were set out in a series of interrelated form contracts drafted by Hancock.

Those terms which are pertinent to this Petition provided that every two weeks during the first six months Ruseckas would receive from Hancock a fixed payment in lieu of earned commissions. Gunsten would provide both training supervision and Hancock-designed promotional materials. Ruseckas's

continuing participation in that arrangement would be conditioned upon his meeting quarterly sales quotas. There were three quota components: number of "lives" sold (i.e., individual insureds), total face value of policies sold, total first-year premiums on policies sold. Failure to meet any quarterly quota component was grounds for immediate termination. Hancock had the sole right to waive quota requirements.

During the initial six month period, commissions for Ruseckas's sales would be assigned to Gunsten and reassigned to Hancock. If Ruseckas had successfully completed the initial six-month quota, those earned commissions, together with all subsequently-earned commissions, would have been placed in a "stabilization fund" from which Ruseckas would have drawn 25% of the current balance every two weeks, together with a reduced fixed payment. Upon successfully completing four years in this "stabilized earning program" (STEP), Ruseckas would have collected the balance in his stabilization fund. Thereafter he would have sold insurance on a straight commission basis, while receiving residual commissions from renewal premiums on the policies he had previously sold. This had the potential for providing him a sizable income.

A novice by definition will enjoy no income from renewals and therefore has little hope of earning a living income on a straight commission basis. In recognition of this, subsidized sales agent training programs such as Hancock's STEP permit the novice to enjoy a modest fixed income while developing the two essentials of life-insurance sales: leads to customers and selling skills.

Ruseckas had had prior experience in industrial sales, but this provided him with no life insurance leads. He quickly learned that a completed life insurance sale -- generating a lead (for example, by resort to a mailing list), making a sales pitch, obtaining a signed insurance application, and awaiting processing and approval of that application by respondents' organizations -- frequently took two months or more. An agent who is starting cold, without any leads, would have little or no chance of completing any sales in less than that period of time.

Ruseckas's Air Force Reserve activities were with an Associate Reserve unit. They involved a substantially higher level of training and participation than the usual National Guard or Reserve component. Members of his

unit often would go on active duty for a few days at a time, during which they would fly overseas supply missions. Ruseckas could not maintain adequate proficiency as a C-5A navigator merely by attending week-end training once a month and two weeks of summer camp. In consequence, he was absent from work a total of twelve days during his first four months with Gunsten. Nonetheless, he averaged in excess of 40 hours weekly in insurance activities.

Initially, Ruseckas's productivity was low. Like many of his fellow trainees, he barely met the first quarterly quota. Gunsten suggested that Ruseckas should cut back on his Reserve activities if he wanted to succeed on the STEP program. Ruseckas thereafter reduced his Reserve participation to a minimum, and soon had met two of the three quota components for the second quarter. By the end of July, with two months remaining in the quarter, he only had to sell two and a half more lives* in order to "validate," i.e., to meet his six-month quota.

Notwithstanding Ruseckas's improved sales performance, on July 29 Gunsten delivered an ultimatum to him: Get out of the Associate Reserve unit, or get out of the STEP program. Believing he had no alternative, Ruseckas resigned under protest. Then he promptly invoked the conciliation services of the Department of Labor, which is charged with a statutory responsibility to seek amicable resolution of Veterans' Reemployment Rights Act disputes. 38 U.S.C. § 2025.

Nine weeks later, by which time Ruseckas's validation period had expired, Department of Labor mediators convened a meeting at Gunsten's offices. Although there were acrimonious exchanges between Ruseckas and Gunsten, the mediation effort was apparently successful. Gunsten agreed to take Ruseckas back, and Ruseckas agreed to minimize his Reserve participation. Reinstatement was to take effect immediately after Ruseckas had discharged his scheduled Reserve commitments.

Just after that meeting ended, Ruseckas returned to Gunsten's office to get a "rate book," containing the Hancock premiums for various policies. Sales agents were expected to study it. Gunsten told Ruseckas that he would not be "entitled to it until you get back."

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* On occasions, two sales agents would jointly pitch to a prospect. If this resulted in a sale, each agent would be credited with a "half" life.

The next day, Gunsten called the Department of Labor mediators and informed them that Ruseckas's reinstatement would have to be delayed, because Hancock had arranged for cancellation of Ruseckas's State insurance sales license on account of his resignation. Gunsten had conveniently forgotten to mention the license cancellation the day before.

Seven weeks later, Ruseckas was again licensed to sell life insurance. On November 21, 1977, Ruseckas returned to Gunsten's office to pick up his license and a copy of the insurance rate book. At that time, Gunsten verified that many minor incidents of Ruseckas's employment would be changed. Ruseckas perceived this as harrassment. He asked Gunsten what the terms would be for his six-month validation, but learned nothing. Because Ruseckas was scheduled for an Air Force flight that week, it was agreed that he would delay resuming work for another week.

On November 28, Ruseckas again returned to Gunsten's office. He was fully prepared to resume his career in insurance sales. He pressed his inquiry about the six-month validation date, because he would have been greatly disadvantaged by his long absence from insurance sales activities. The intervening four months had left him bereft of leads or prospects. He sought assurance that he would be allowed at least the two months which remained in the quarter at the time of his forced resignation. In response, Gunsten

> would not tell me how much longer he would give me, exactly how much time would he give me to produce the other lives so that I could validate the contract. He would not tell me. He would say -- he said, "I don't determine that. That has to be determined at the [Hancock] home office."
>
> And I said, "When are you going to determine that?"
>
> And he said, "We are not going to determine anything until we have a letter from the Department of Labor which says that this whole matter is resolved."

Gunsten confirmed this. He testified, "I asked [Hancock] to determine what the situation would be, and they said when we get the letter from the Labor Department, all of that will be taken care of." Gunsten's statement that Hancock would not set a revised validation date so long as the Department of Labor was monitoring the reinstatement of Ruseckas was verified by Hancock vice-president James Kean. On December 9, 1979, Ruseckas telephoned Kean, who stated that Hancock was waiting for the Labor Department to close its file on the matter before any validation date would be set.

Ruseckas recognized that the time within which he would have to sell the required additional lives was a crucial incident of employment; it would probably determine whether he could "validate," and thus continue in the STEP program. He could justly have demanded additional time to compensate him for the developing sales prospects that he had lost as a direct result of his forced resignation. Yet respondents refused to guarantee him even the two unused months from his original second quarter. In consequence, he refused to accept reinstatement so long as Hancock would not set a revised validation date. Accordingly, Ruseckas's reinstatement never took effect; the earned commissions which were being held for his stabilization fund were pocketed by the respondents.

Ruseckas then brought suit on a variety of theories of recovery. In upholding the district court's verdict for respondents on the Veterans' Reemployment Rights Act claim, the court of appeals found no legal significance in the fact that Ruseckas "was unsuccessful in his attempts to ascertain how much time he would be given to complete the John Hancock training program" (App. 5). It agreed with the trial court's finding that Ruseckas had knowingly and voluntarily resigned, thereby waiving any rights he might have had under the Act. Id.

REASONS FOR GRANTING THE WRIT

The record contains strong indications that Gunsten's reinstatement offer was a sham. Even if it were made in good faith, as the judgments below imply, it left Ruseckas substantially disadvantaged as a direct result of the "ultimatum" which both courts found (App. 3, 8) that Gunsten had delivered on July 29. That ultimatum constituted a flagrant violation of the Veterans' Reemployment Rights Act. It conditioned continuing employment on petitioner's leaving his Reserve unit.

The terms of reinstatement which Gunsten finally imposed did not fully extinguish the harm to Ruseckas which flowed from that ultimatum. At a minimum, they left Ruseckas disadvantaged because he had lost all of the leads and prospects which he enjoyed at the time of the ultimatum. He was further disadvantaged because he had lost four months' income (subject to offsets from his Air Force earnings).

A revised validation date was an essential incident of Ruseckas's employment contract. If he failed to meet the contractual quota allowed, he would lose his job and he would forfeit his contingent interest in the earned commissions which had been reserved for his stabilization fund. The less time allowed him, the more likely he would fail. If the time permitted did not allow for an adequate period within which to develop new leads and prospects, Ruseckas would suffer prejudice, perhaps fatal prejudice, from the four month interval during which he had been unable to sell insurance. That prejudice would have been directly and proximately caused by Gunsten's ultimatum.

In a very practical sense, the date which only Hancock could set for Ruseckas to meet his six month quota would have been the acid test for whether the reinstatement offer was a sham. And from a legal perspective, until that date were set, respondents were withholding from Ruseckas a major incident of employment -- and their conduct in doing so was inextricably intertwined with Gunsten's unlawful ultimatum.

Ruseckas's new validation date was therefore of singular importance. It surely was entitled to no less statutory protection than a transfer opportunity, Barrett v. Grand T.W.R.Co., 581 F.2d 132 (7th Cir. 1978); or a pension credit, Smith v. Industrial Employers and Distributors Assoc., 546 F.2d 314 (9th Cir. 1976), cert. denied, 431 U.S. 965; or a vacation credit, Hollman v. Pratt & Whitney Aircraft, 435 F.2d 983 (5th Cir. 1970). Clearly, the validation deadline was a protected "incident . . . of employment" under the Act.

Neither of the courts below addressed Ruseckas's vigorous argument to that effect. Instead, they each found sub silentio that respondents' conduct in all instances was lawful. If that unstated finding were correct, then petitioner had had no statutory rights to waive. But if it was incorrect, then respondents' misconduct provoked petitioner's resignation, which must therefore be deemed a constructive discharge rather than a waiver.

A: The decision below conflicts with the language of the Veterans' Reemployment Rights Act and with the interpretive principles announced by this Court

This Court has long since held that the Veterans' Reemployment Rights Act, like its predecessors, must be given "as liberal a construction for the benefit of the veteran as a harmonious interplay of its provisions permits." Fishgold, v. Sullivan Corp., 328 U.S. 275, 285. In accord, Alabama Power Co. v. Davis, 431 U.S. 581. The courts below have acted in derogation of that principle, by concluding that Ruseckas was obliged to accept reinstatement on terms which did not specify a particularly important incident of that employment. The decision below cannot be harmonized with this Court's teachings or with the language of the Act. The writ should therefore issue to resolve this conflict.

B: The decision below creates a conflict between circuits

The decision below is in conflict with rulings in another circuit and in two districts. Those courts have uniformly held that a resignation in the face of a violation of the Veterans' Reemployment Rights Act does not waive the Act's protections. For example, Hanna v. American Motors Corp., 557 F.2d 118, 122 (7th Cir. 1977), recognized that a resignation would be a "discharge" under the Act, albeit voluntary at common law, if that resignation were provoked by the employer's withholding of an incident or advantage of employment by reason of Armed Services activities which are protected by the Act. Likewise, Witter v. Pennsylvania National Guard, 462 F.Supp. 299, 301 (E.D.Pa. 1978), held that a resignation demanded on account of impending military service constituted a discharge within the meaning of the Act, and therefore did not waive the Act's reinstatement provisions. And Peel v. Florida Department of Transportation, 443 F.Supp. 451, 453 (N.D. Fla. 1977), rejected an employer's contention that the Act did not apply to an employee who, like Ruseckas, by not coming to work "was deemed to have abandoned his position."

It therefore is apparent that the unprecedented decision below conflicts with those of other courts on the important question of whether a provoked resignation, such as Ruseckas's refusa to work without knowledge of his deadline, is a constructive discharge in violation of the Veterans' Reemployment Rights Act. The writ should issue to resolve this conflict.

C: The decision below raises an important and recurring question in employer-employee relations, namely, under what circumstances does an employer's statutory violation justify an aggrieved employee's resignation

Congress has enacted numerous statutes which govern conduct in the workplace. Employee grievances based on those enactments and culminating in resignation under protest are a recurring feature of the free enterprise system. Adjudicators must often decide whether an employee voluntarily resigned or was provoked into resigning, and therefore was constructively discharged.

The issue arises in the context of almost every regulatory scheme governing the workplace, and not just in veterans' cases. It is a routine fixture of State unemployment compensation proceedings, and the analogous Federal proceedings in the District of Columbia. It sometimes emerges under such other statutory provisions as minimum wage (29 U.S.C. § 215(a)(3)), equal employment opportunity (42 U.S.C § 2000e), age discrimination (29 U.S.C § 626), ERISA (29 U.S.C. § 1140), and OSHA (29 U.S.C. § 660(c)). For example, a woman who resigns rather than subjecting herself to continuing sexual harrassment does not thereby waive her statutory right to equal employment opportunity. Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir. 1978).

Logically and legally, the threshold question in such cases must always be whether the employee's grievance was well taken. Cf. Whirlpool Corp. v. Marshall, ___ U.S. ___, 100 S.Ct. 863 (upholding agency regulation prohibiting employer retribution against workers who refuse to perform assigned tasks which in fact risk death or serious injury). In petitioner's case, that threshold question was ignored. The judicial inquiry was limited to an out-of-context evaluation of his reaction to respondents' wrongs. By adopting that unduly narrow scope of inquiry, the courts below have read non-existent conditions into remedial legislation. Their jurisprudence discourages employees from grieving employer misconduct and eviscerates the salutary policies adopted by the Congress.

The decision below evidences a need for this Court's guidance in determining when resignation is a justifiable and protected response to an employer's lawless conduct. The writ should issue to provide that guidance.

D: The decision below raises an important question of public policy, namely, whether an employer can condition voluntary compliance with statutory requirements upon cessation of governmental inquiry

Respondents' refusal to set a new validation date so long as the Department of Labor had not closed out the case can only be described as outrageous. The Department of Labor's mediation efforts are central to the operation of the Act. They undoubtedly serve to reduce the number of reservists' rights disputes which go into litigation. Their importance is underscored by respondents' refusal to make petitioner whole so long as the Department of Labor remained on the scene.

Counsel knows of no court which has held that an employer in violation of the law can condition voluntary correction upon a governmental agency's promise to cease and desist monitoring the situation. Surely the judiciary would not entertain an employer's offer to stop paying less than the minimum wage prescribed by the Fair Labor Standards Act, 29 U.S.C. § 106, if that offer were conditioned upon agreement by the Department of Labor to stop examining that employer's payroll.* Neither would the judiciary be likely to hold that an employee who quits because his pay was below the Federal minimum rate has thereby waived any claim to recover the deficiency.

Petitioner's case cannot be distinguished from the minimum wage hypothetical spelled out above. Respondents refused to provide petitioner with an essential incident of employment so long as the Department of Labor would not bow out of the picture. In effect, they imposed recrimination upon petitioner because he had had the temerity to seek the assistance of the appropriate agency of government. To sanction such recrimination, as the courts below have done, is to chill the citizen's right to petition for redress.

Public policy, petitioner respectfully submits, cannot tolerate the emergence of a doctrine which indulges the beliefs of some employers that Federal agencies, acting within the scope of their statutory responsibilities, are officious intermeddlers in the Nation's workplace. The courts below have embarked upon that course. They have adopted as their underlying

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* Other analogies point up the impropriety of the condition unilaterally imposed by the respondents for setting a new validation date. For example, it is inconceivable that the IRS would settle a deficiency on condition that there will be no further audits of the taxpayer.

precept the dead letter doctrine that Congress cannot regulate the relationship between employer and employee.

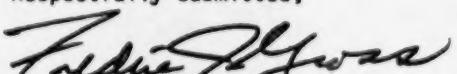
If this Court were to tolerate a resurrection of that long-discarded jurisprudence, it would effectively be repealing decades of congressional effort to obtain fair and decent conditions in the workplace through administrative agency mediation. Accordingly, the writ should issue in order to determine an important question of public policy, namely, whether an employer is ever permitted to condition compliance with statutory requirements upon a federal agency's agreement to abandon its lawful investigation and mediation activities.

CONCLUSION

This Court has always shown special concern for the employment rights of those who serve their Nation. The court below did not share that concern. Its disregard of respondents' statutory violations, which provoked petitioner to resign, is contrary to all of the published precedents. If extended beyond the immediate facts, the tolerance shown by the court of appeals for respondents' desire to be free from governmental oversight will generate chaos in the enforcement of numerous remedial statutes.

Accordingly, the writ should issue so as to clarify what incidents of employment are protected by the Veterans' Reemployment Rights Act and to identify the limits on employers' rights to resist agency mediation or investigation, and the concomitant limits on employees' rights to refuse to work under unlawful conditions.

Respectfully submitted,



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On the Petition:

BRUCE H. WILLIAMS

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-1477

John A. Ruseckas, Appellant,

-versus-

Howard B. Gunsten, t/a The Gunsten Agency; John Hancock Mutual Life Insurance Company, Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. John A. MacKenzie, District Judge.

Argued: March 5, 1980. Decided: May 1, 1980

Before RUSSELL and SPROUSE, Circuit Judges, and CHARLES H. HADEN II, United States District Judge for the Northern and Southern Districts of West Virginia, sitting by designation.

Fredric J. Gross (Joanne Ventura on brief) for Appellant; Robert L. Ellis (Siciliano, Ellis, Sheridan & Dyer on brief) and E. Waller Dudley for Appellees.

PER CURIAM:

The appellant, John A. Ruseckas, sought employment with the appellee, The John Hancock Mutual Life Insurance Company (Hancock), during the early months of 1977. On March 28, 1977, the appellant was formally hired into the subsidized agent program of Hancock and began working for the Gunsten Agency (Gunsten), a general insurance agency. Throughout his association with Gunsten, the appellant served as a Captain in the United States Air Force Reserve.

Ruseckas' initial performance under the subsidized agent program was deemed unsatisfactory by Gunsten[1] and led to a meeting on June 3, 1977 at which time Ruseckas indicated that he would decrease his Air Force Reserve activity in order that he might devote more time to his insurance sales. The employment relationship continued to be strained so that a meeting between the two principals was called on July 29, 1977. At this time Ruseckas informed Gunsten that he would not decrease his reserve activity.

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[1] During the first four months with Hancock, Ruseckas was credited with placing 9 1/2 policies. Of these, 6 1/2 were the result of leads furnished by Gunsten, one policy was taken out on Ruseckas' own life and one policy was issued on the life of Ruseckas' daughter.

Gunsten then gave Ruseckas an ultimatum that his flying duties would have to be curtailed within 60 days. Ruseckas tendered his resignation on August 1, 1977..

Mediators from the Department of Labor intervened in Ruseckas' behalf and on October 4, 1977, Gunsten reinstated the appellant as a subsidized agent. Upon the reissuance of his insurance license on November 11th, Ruseckas returned to work on the 21st; however, prior military flight obligations necessitated his departure at the end of the day. Ruseckas came to work on the 28th and for a few hours on the 29th, but he again tendered his resignation on the 30th.

The appellant instituted an action against Gunsten and Hancock alleging violations of the Veteran's Reemployment Rights Act, 38 U.S.C. §§# 2201, et seq., and the Sherman Act, 15 U.S.C. §§ # 1 et seq., as well as common law breach of employment contract, and a claim under the Virginia statute of Insulting Words, § 8.01-45, Code of Va. 1950. The district court dismissed all claims against Hancock after the completion of the appellant's evidence. Gunsten's motion for directed verdict was granted as to the antitrust claim. After completion of all the evidence, the court, with agreement of counsel, submitted two issues to the jury, the insulting words charge and the breach of employment contract claim and reserved ruling on the Veteran's Act charge against Gunsten.

The jury found for the defendant on the insulting language claim and on the breach of employment contract claim, finding that the appellant's resignation on November 30th was voluntary and that Gunsten therefore was not guilty of breach of contract. Based on this finding and in consideration of all the evidence presented, the district court found that Gunsten had not violated the provisions of the Veteran's Reemployment Rights Act. We agree with this determination and affirm the district court's decision in its entirety.

While it is not beyond dispute that the Veteran's Act is applicable to the instant case, for the purposes of this opinion such coverage may be assumed. The Act provides at 38 U.S.C. § 2021(b)(3) that:

> "Any person who holds a position . . . . . [in the employ of a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Services."

Thus the issue on appeal becomes whether Ruseckas' termination on November 30th was the result of a voluntary act by the appellant or an involuntary act resulting from harassment or duress by his employer, Gunsten. If the former is the proper resolution of the issue then the appellant will be deemed to have waived his rights under the Veteran's Act.

At trial the appellant testified that upon his return to work in November he was informed that he had been assigned to a new desk and that he would be working directly under Mr. Gunsten, as opposed to his previously assigned agent, Mr. Kunen. Also the appellant was unsuccessful in his attempts to ascertain how much time he would be given to complete the John Hancock training program. Based on these factors the appellant determined that his job environment had become intolerable and quit on the 30th. The jury as well as the district court found the appellant's resignation to have been an act of free will, and we find no evidence in the record contrary to this finding. Before a party is deemed to have waived his rights under the Veteran's Act there must be clear and cogent proof that the waiver was knowledgeable and voluntary. Smith v. Missouri Pacific Transporation Company, (8th Cir. 1963) 313 F.2d 676, 680; Wright v. Ford Motor Company, (E.D. Mich. 1961) 196 F. Supp. 538, 540. We cannot imagine an act which shows waiver more clearly than voluntarily walking off the job.

We find the appellant's second cause of action under the Sherman Act equally unpersuasive. Ruseckas argued at trial that he was "blacklisted" by the insurance industry and thus prevented from obtaining employment following his resignation at Hancock. The evidence adduced, however, was contrary to the appellant's contentions. At United Services Automobile Insurance the appellant terminated negotiations when he

discovered that the company had no "subsidized" agent program. At Occidental Life of California the appellant failed an agent's examination necessary for employment. Finally at Lincoln National Insurance the appellant was offered a position selling on commission, but later decided that this arrangement was unsatisfactory. The district judge had ample opportunity to evaluate the credability and demeanor of the witnesses and concluded that there was "absolutely no proof of any conspiracy" to deprive Mr. Ruseckas of employment in the insurance business.

For the foregoing reasons we affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JOHN A. RUSECKAS,
Plaintiff

v.

HOWARD B. GUNSTEN, t/a
THE GUNSTEN AGENCY, ET AL.,
Defendants

CIVIL ACTION
NO. 78-669-A

MEMORANDUM ORDER

Background

The plaintiff, John A. Ruseckas in the period in suit was a Captain in the United States Air Force Reserve. He was, for all practical purposes, on full time active duty as opposed to "weekend warrior" reserve activity with the usual two weeks active duty in the summer months. For instance, from November 1, 1976 through October 31, 1977, which includes the period of his employment with defendant, Captain Ruseckas was on active duty for 182 days, earning, with allowances, more than $15,600.

Early in 1977, according to Captain Ruseckas himself, he decided to reduce his reserve activity and to seek civilian employment. To this end, he answered an employment advertisement in the Washington Post inserted by the defendant, a general insurance agency in the City of Washington, D. C. representing John Hancock Life Insurance Company. After preliminary interviews with people with the Howard B. Gunsten Agency, a deal was struck to hire Ruseckas as a "subsidized" agent with the Gunsten Agency. Upon proof of his Air Force earnings in the pre-

vious year, plus allowances, Ruseckas' subsidized salary was fixed at $15,000 and he began work on March 28, 1977.

Although now employed as a full time life insurance agent with the Gunsten Agency, Ruseckas continued to fly extensively with the Air Force Reserve continuing to earn approximately what he had earned before his association with Gunsten. Between March 28, 1977 and July 29, 1977, Ruseckas' performance as a subsidized agent was unsatisfactory generally and precipitated a confrontation with Howard Gunsten over his continued considerable Air Force activity. On June 3, 1977 at a meeting with Gunsten, Ruseckas indicated he would reduce his active duty time and would seek a normal reserve billet, requiring much less participation. On July 29, 1977, in a somewhat acrimonious exchange, Gunsten sought to find out if Ruseckas had found a less active reserve component as they had discussed on June 3. Captain Ruseckas then told Gunsten that he was not going to seek any normal or lesser reserve status. Gunsten then gave Ruseckas an ultimatum that his extended active duty would have to end within 60 days in favor of a more limited, normal, reserve status, if Ruseckas was to continue with the Gunsten Agency. As a result, Ruseckas handed in his resignation on August 1.

Thereafter, in August, Ruseckas called upon the Labor Department to represent him in what he claimed was unfair treatment at the hands of the Gunsten Agency. After a series of interviews, a joint meeting was held with the Department of Labor mediators urging Gunsten to take Ruseckas back and on October 4, 1977, Gunsten reinstated Ruseckas as a "subsidized agent" with Ruseckas to report when his previously surrendered insurance license could be reissued.

That license was finally reissued November 11, 1977 and on November 21, 1977 Ruseckas returned to work.

However, being obligated for a military flight, Ruseckas then left on November 21, not returning to the Gunsten Agency until November 28. He stayed at work for only a short period on November 28, returned for a shorter time on November 29, and then on November 30, called Gunsten and said that he was not going to return to work. Ruseckas thereafter said he contacted several insurance agencies but was unable to secure a "subsidized" contract of the type he had with the Gunsten Agency.

In October 1978 the present action was filed against Howard B. Gunsten, t/a The Gunsten Agency, and the John Hancock Mutual Life Insurance Company, as defendants. The first two counts of the cause of action charge both defendants with violation of the Veteran's Reemployment Rights Act, 38 U.S.C. §§ 2201 et seq. Count three proceeds against Gunsten alone over a name calling incident of October 4, 1977, predicated upon the Virginia Statute of Insulting Words, § 8.01-45, Code of Va. 1950. The fourth count, against Gunsten only, charges a breach of the employment contract. Counts five, six and seven, proceeded against both defendants alleging violation of the anti-trust laws, specifically the Sherman Act.

After the completion of the plaintiff's evidence, for reasons fully set forth in the record, the Court dismissed John Hancock Mutual Life Insurance Company as a defendant and directed a verdict for the defendant as to the anti-trust charges in the complaint. After completion of all evidence, the Court, with agreement of counsel, submitted two issues to the jury, the insulting words charge, and the breach of employment contract claim and reserved to itself a determination of the counts with regard to the Veteran's Reemployment Rights Act and its application to this case.

Decision on Veteran's Reemployment Rights Act, Counts One and Two

The jury, returning a separate verdict on each of the two counts submitted to it, found for the defendant on both the insulting language claim in count three and on the breach of employment contract claim in count four. The contract claim was discussed by the Court at length with the jury, telling them, with the agreement of counsel, that the jury was not to be concerned with the plaintiff's July 29 resignation in view of the fact that he had been reinstated in October, and that they were to concern themselves with the events of October and November 1977. They were admonished generally that if they found that the plaintiff had quit or resigned on his own volition on November 30, 1977, voluntarily, then they would find for the defendant on the contract count. On the other hand, they were also told that if they found that Ruseckas left on November 30 as the result of harassment or arbitrary or capricious conditions inflicted by Gunsten upon Ruseckas' return to work, in such event, they should find that his leaving his employment was not voluntary and they should find for the plaintiff upon that claim.

The jury, in determining there was no breach of contract, found, necessarily, that plaintiff left voluntarily on November 30, 1977 and was not pressured in that decision by any harassment, or arbitrary or capricious conduct on the part of the defendant.

Such decision is certainly advisory to the Court, but even without the jury decision on that question, this Court, on its own assessment of the evidence, concludes that Ruseckas left his employment voluntarily.

We conclude, therefore, that Ruseckas is not entitled to any benefits under the Veteran's Reemployment Rights Act, 33 U.S.C. § 2021(b)(3). That section provides

that a person cannot be denied retention in employment because of an obligation as a member of a Reserve component of the Armed Forces [§ 2021(b)(3)].

First: Captain Ruseckas has not been denied retention of employment because of a Reserve obligation. While there was undoubted abrasion as a result of his extended active duty efforts, even this, we find, and the jury also found, was not the cause of his leaving the Gunsmoke Agency. Put bluntly, he quit of his own volition.

Second: For appellate purposes we also find that the extended active duty engaged in by Captain Ruseckas is not protected by the language of § 2021(a) wherein the person seeking the Veteran's Reemployment Rights must ". . . make application for reemployment within ninety days after such person is relieved from such training and service . . . ." [Emphasis added.]

Captain Ruseckas was here indulging himself in a "subsidized" agent's job with a salary specifically fixed upon his previous earnings as a full time flyer, and at the same time claiming the right to continue in flying pursuits, unabated. He so stated positively in his testimony. He accepted a career position. Without any question, he understood that the "subsidizing" of his new job, in which he would earn practically nothing initially, was to carry him along in his accustomed lifestyle as he learned the life insurance sales business. His claim that he saw nothing wrong with accepting the subsidy in his new job and all the while continuing the old did much, in our opinion, to destroy his credibility.

Likewise 33 U.S.C. § 2024(d) is of no aid to him. A reading of that section shows it applies to active duty for which a leave of absence has been sought. That has nothing do with this case.

So, also, Bankston v. Stratton-Baldwin Company, [illegible] Supp. 247 (S.D. Ala. 1977) is not applicable. [illegible] reservist was found to have been discharged be- [illegible] teen days absence to fulfill his annual [illegible] igation at a summer training camp. In the [illegible] us, the Court, and a jury, have found that [illegible] left voluntarily, not discharged. Also we find [illegible] olunteer active duty status not to approximate [illegible] summer encampment.

The claims of palintiff on Counts One and Two [illegible] laint are DENIED.

It is so ORDERED.

John A. Warcuzen
United States District Judge

[illegible], Virginia
[illegible], 1979.